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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RONALD BELL, FRANK AROSTEGUI, RICHARD McLEAN, ROBERT THOMAS, ROBERT FAIR, JOHN HICKEY, KENNETH A. LEIBNITZER, GEORGE MEYER, EDWARD J. KING, ORLANDO PAREDES, and ROBERT L. DAUGHERTY,

Petitioners,

vs.

CITY OF MIAMI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

Whether the decision of the Supreme Court of Florida approving of the City of Miami's deducting workers' compensation from disabled employees' pensions from the date of retirement to August 1, 1989, violates due process of law guaranteed by the federal Constitution when: (a) the Court held that the employees were entitled to their pensions and workers' compensation which the City had illegally taken from them prior to the *Barragan* decision; but, (b) it would be unjust to require the City to pay this fiscal obligation because: (1) the employees' contracts provided for the illegal deduction (although no such contracts were in evidence and employees cannot agree to illegal conduct by employers); and (2) it would be unfair to today's taxpayers to require them to pay for yesterday's fiscal obligations.

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RONALD BELL, et al.,

Petitioners,

vs.

CITY OF MIAMI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida entered in this action on March 3, 1994, which became final when the Supreme Court of Florida denied rehearing on April 11, 1994.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported as *City of Miami v. Ronald Bell, et al,* 634 So. 2d 163 (Fla. 1994), and appears in Appendix C to this Petition. The opinion of the First District Court of Appeal in *City of Miami v. Bell,* 606 So. 2d 1183 (Fla. 1st DCA 1992), and appears in Appendix D to this Petition. The Order of the Judge of Compensation Claims dated May 13, 1991, appears in Appendix E to this Petition.

JURISDICTION

The opinion of the Supreme Court of Florida in this matter was filed on March 3, 1994. A Petition for Rehearing was timely filed. The Supreme Court's denial of the Petition for Rehearing was issued on April 11, 1994, and is set forth in Appendix A. This Court's jurisdiction is invoked under Title 28, U.S.C. §1257.

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

Amendment V to the United States Constitution is set forth in Appendix G. Amendment XIV to the United States Constitution is set forth in Appendix H. City of Miami Ordinance No. 40-212(N) is set forth in Appendix I.

STATEMENT OF THE CASE AND FACTS

The Petitioner, Ronald V. Bell, was a firefighter employed by the Respondent, City of Miami, Florida.

He was injured in the line of duty on January 23, 1985. The City accepted that he was permanently totally disabled due to accidental injury under the Florida Workers' Compensation Law on September 24, 1987. At the same time, the City awarded him a service-connected, total disability pension from the City's retirement trust fund to which he and the other City employees contributed from their bi-weekly paychecks. The City also contributed to the trust.

Some twelve years earlier, the State of Florida had repealed §440.09(4), Fla. Stat., effective July 1, 1973. Laws of Fla., Ch. 73-127. This repealed statute had formerly authorized the deduction of workers' compensation payments from pensions

earned by government employees. That same year, actually fiscal year 1973-1974, the City of Miami pursuant to its own ordinance began the practice of not only deducting workers' compensation payments from the disability pensions of its employees, but also withdrawing from the pension trust fund an amount equal to the workers' compensation payments which had been offset. The City paid the money taken from the pension trust fund to itself. Thus, at the end of each fiscal year, the totally disabled employees received only the amount of their pensions, because all of the workers' compensation payments were offset. However, the City paid no workers' compensation because the workers' compensation payments were subtracted a second time by the City's taking the money from the pension trust in an amount equal to the benefits which were offset.

In 1977, the employees sued the City complaining that the City of Miami had engaged in a number of breaches of trust, one of which was that the City had paid workers' compensation benefits from the employees' trust fund. The Circuit Court found against the City on the issue of liability and the City appealed to the Florida Third District Court of Appeal, which affirmed in *City of Miami v. Gates,* 393 So. 2d 586 (Fla. 3rd DCA 1981). *[Gates I].*[1]

In *Gates I,* the City argued that it was not a breach of trust to take money from the pension trust fund to pay its workers' compensation obligations to the disabled employees because the trust fund money would go to the employees eventually anyway. In rejecting this claim, the Florida

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[1] The Florida Third District Court of Appeal subsequently held that *Gates I* was not a bar to the employees' claim for workers' compensation which had been offset. *City of Miami v. Gates,* 592 So. 2d 749 (Fla. 3rd DCA 1992) *[Gates II].*

Third District Court of Appeal observed in its 1981 decision:

> This claim amounts to the suggestion that, while one may not rob Peter to pay Paul, it is permissible to take from Paul himself in order to do so. It need hardly be stated that we thoroughly disagree with such a proposition. *Gates I*, at 588.

The Court of Appeal held that the City had illegally taken money from the trust fund to pay its workers' compensation obligations by paying the employees with their own money. *Gates I*, at 588.

Nonetheless the City continued thereafter to offset workers' compensation payments against disability pensions and was doing so at the time of Bell's retirement in 1987.

The disabled employees filed workers' compensation claims to obtain the money that had been illegally deducted from their pensions. The first case involved a police officer, Giordano. He obtained an order

from the Judge of Industrial Claims awarding him workers' compensation for the amount offset from the date of his retirement. The City appealed and the Florida First District Court of Appeal PCA affirmed in *City of Miami v. Giordano,* 488 So. 2d 538 (Fla. 1st DCA 1986) *[Giordano I].* However, following this decision, the City again offset Giordano's payments such that he filed claim a second time. Meanwhile, another policeman, Barragan, made the same claim and he also received an award of workers' compensation for the amounts deducted from his pension from the date of his retirement. Giordano's second case and Barragan's case were consolidated when they eventually reached the Supreme Court of Florida. In *Barragan v. City of Miami,* 545 So. 2d 252 (Fla. 1989), the Supreme Court of Florida held that the deduction of workers' compensation from the employee's disability pensions for accidents that

happened after July 1, 1973, was unlawful under State law, such that Barragan and Giordano were entitled to workers' compensation and their disability pensions so long as the combination of the two did not exceed the average monthly wage, which is the amount earned at the time of injury.

Following *Barragan*, the City paid Barragan and Giordano from the date of retirement, but the other disabled employees were only paid from August 1, 1989, forward.[2]

Following *Barragan*, the similar claims of six other employees were affirmed. *City of Miami v. Burnett*, 596 So. 2d 478 (Fla. 1st DCA 1992) when the Florida First District Court of Appeal held that *Barragan* applied to money taken from the disabled employees from the dates of their respective retirements to August 1, 1989,

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[2] The *Barragan* decision became final July 14, 1989.

when the City discontinued the illegal offset. The Supreme Court of Florida declined review sub nom. *City of Miami v. Ogle, et al,* No. 80,055 (Fla. October 14, 1992).

When the Petitioner, Bell, received his disability retirement on September 24, 1987, the Respondent, City of Miami, began deducting his workers' compensation payments from his disability pension. He filed a workers' compensation claim similar to Barragan's. At the hearing, the City presented no witnesses and no exhibits other than the City's ordinance providing for the offset, which had been declared unlawful in *Barragan*. In particular, there was no evidence of a contract or agreement by the employee to be treated in this manner. The Judge of Compensation Claims awarded him workers' compensation from the date of his retirement on September 24, 1987, to August 1, 1989, but not exceeding 100% of his

average monthly wage, together with penalties and interest for the late payment. The City appealed and the Florida First District Court of Appeal affirmed in *City of Miami v. Bell,* 606 So. 2d 1183 (Fla. 1st DCA 1992). The Court of Appeal affirmed the award holding that *Barragan* applied to the other employees from the date of retirement and that penalties and interest were proper. However, the Court certified the case to the Supreme Court of Florida as presenting a question of great public interest whether the award of penalties was proper. Similar cases involving awards to ten other employees who, like Bell, were injured after July 1, 1973, and had had their pensions offset from the date of retirement to August 1, 1989, were also certified. These involved police officers, Frank Arostegui, Robert Thomas, John Hickey, and Orlando Paredes, and firefighters, George Meyer, Robert Fair, Kenneth A. Leibnitzer, Edward J. King, and

Robert L. Daugherty, and sanitation worker, Robert McLean. Their cases were consolidated with Bell's by the Florida Supreme Court.[3]

The Florida Supreme Court decided in *City of Miami v. Bell,* 634 So. 2d 163 (Fla. 1994), that the award of penalties and interest from July 14, 1989 (the date *Barragan* became final), to August 1, 1989, was correct, but otherwise moot since the Court revisited *Barragan* and decided that it should not apply to the other employees from the date of their retirements, August 1, 1989. The Court held that it recognized that the City had unlawfully deducted workers' compensation from the disability pensions of the eleven employees involved and that the obligation to pay workers' compensation benefits was a fiscal obligation of the City. However, the Supreme Court of Florida

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[3] *City of Miami v. Bell,* at page 165, footnote 3.

concluded that the City did not have to pay for this illegal deduction because: (1) "the City's contracts with its employees recognized the City's right to an offset", and (2) to "...subject today's taxpayers to yesterday's fiscal obligations... would be fiscally unjust to the taxpayers of the City of Miami". *City of Miami v Bell,* at 166.

As the Supreme Court of Florida raised on its own and for the first time that the City of Miami is not liable to pay for vested pension benefits because it would be unfair to the taxpayers of today to require them to pay for yesterday's fiscal obligations, the Petitioners raised the federal question of due process of law violations in the motion for rehearing, which is contained in Appendix B and which was denied by the Supreme Court of Florida by order dated April 11, 1994, which is contained in Appendix A.

It is from this decision that Bell and the other ten disabled employees in the consolidated cases seek certiorari in this Court.

REASONS FOR GRANTING THE WRIT

That pension benefits are a property right enjoyed by employees in the private sector was well recognized by Congress in enacting ERISA. No one would dispute that this is also true of employees in the public sector, including local and state government. Indeed, Florida recognizes that pension benefits of public employers are a vested property right after retirement. *Florida Sheriffs Association v. Dept. of Administration,* 408 So. 2d 1033 (Fla. 1981).

Florida recognizes that workers' compensation benefits are a property right. *Florida Forest and Park Service v. Strickland,* 18 So. 2d 251 (Fla. 1944); similarly, this Court recognized that workers' compensation benefits were a

property right substituted for common law rights. See *New York Central R. R. Co. v. White,* 243 U. S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917).

The Florida Third District Court of Appeal in *Gates I* and the Florida Supreme Court in *Barragan* and *Bell,* recognized that the disabled employees had an entitlement to their pensions, to which they contributed, and to workers' compensation which the City had illegally taken from them after 1973. The City of Miami took their property rights illegally according to the Florida Supreme Court. This is a point which the Supreme Court of Florida recognized in the decision below. However, the Supreme Court of Florida constructed an excuse why the City of Miami should not have to make restitution to pay for this illegal taking of property.

This excuse has two parts; both, are novel to the law. Neither will withstand

scrutiny under federal guarantees against the taking of property without due process of law.

The Florida Supreme Court stated that the City's contracts with its employees recognized the City's right to an offset and that to the extent the offset was taken prior to *Barragan*, City employees have received what their contracts called for when their rights vested. *City of Miami v. Bell*, at 166.

In Bell's case (and the others), the City presented no evidence of any contract between Bell and the City, neither oral nor written. There was no evidence of a union contract or of an individual contract in which he or the other employees had agreed to this illegal offset. The only evidence was that Bell worked for the City and that the City had adopted a pension ordinance which contained an offset which was declared unlawful in *Barragan*.

This is a novel holding by the Florida Supreme Court. It is an important question of federal law which has not been decided, but should be, settled by this Court.

According to the Florida Supreme Court, when a person works for local government, and the local government has passed ordinances affecting his property rights (in this case, pension rights), these ordinances are his "contract". They are enforceable against him even though illegal, because he agreed to them; his only agreement was the act of working for the local government.

The Court's statement: "The City's contracts with its employees recognized the City's right to an offset." is deceptive. The Court's statement: "To now hold the City liable for past offsets would effectively modify completed contracts without affording the City an opportunity to renegotiate the other terms of those

contracts, such as salaries and benefits." is deceptive. There was no such contract. All that the record shows and all that existed on this point was two facts: (1) an ordinance providing for a pension offset which was illegal and (2) the fact that Bell worked for the City.

Bell was denied procedural due process of law--fair notice and hearing--now that the Supreme Court of Florida decided the case based on a "contract" which is not in evidence and which does not exist. Certainly the Supreme Court of Florida was not speaking of a union contract when it said that the City's contracts with its employees recognized the City's right to an offset. The union contract was not in evidence. No union contract "recognized the City's right to an offset".

According to this Court in *Barrentine v. Arkansas--Best Freight System, Inc.*, 450 U.S. 728, 67 L. Ed. 2d 641, 101 S. Ct. 1437

(1981), collective bargaining agreements cannot vary statutory rights. A labor union may not agree to less benefits than that provided for by statute. Ibid. While we cannot question such a rule, we can see the reason for it. For otherwise the employer could commit all kinds of illegal acts on its employees: discrimination, unlawful hours, unlawful wages, unlawful working conditions, unlawful health benefits, unlawful pensions, and simply argue when challenged in court: "The union said we could". Clearly, that is not the law and cannot be.

The Florida Supreme Court held that the employees' vested pension rights could be taken from them because they had agreed to it. The Supreme Court of Florida just imagined that agreement. They just made it up. No union contract contained such agreement. Furthermore, unions cannot

agree to vary statutory rights. *Barrentine*, supra.

No individual employment contract contained such agreement. Neither can an individual employee agree to vary statutory rights. All that existed was an illegal ordinance and the fact that the employee worked for the City.

This Court should disapprove of any notion that local government can use its power to pass ordinances which deprive its employees of their statutory rights and that this deprivation is enforceable because the employees agreed to it by the mere act of working for the local government.

The Supreme Court of Florida's decision recognized that the offset was unlawful and took away the employees' vested pension rights. It describes the petitioners' entitlement as the City's "fiscal obligation", but it denies payment of these same fiscal obligations on the ground:

> ...to require back benefits for prior years would be fiscally unjust to the taxpayers of the City of Miami. *City of Miami v. Bell*, at 166.

This is a novel holding by the Florida Supreme Court. It is an important question of federal law which has not been, but should be, settled by this Court.

Can a state repudiate "yesterday's fiscal obligations" because it would be "fiscally unjust to the taxpayers" to "subject today's taxpayers to yesterday's fiscal obligations"?

Not in the United States of America.

Can a state supreme court allow a city to repudiate "yesterday's fiscal obligations" because it would be "fiscally unjust to the taxpayers" to "subject today's taxpayers to yesterday's fiscal obligations"?

Not in the United States of America.

What is wrong here is that state and local government cannot use its power as a government to absolve itself of lawful debt

just because it would be hard for the taxpayers of today to pay for yesterday's lawful debt.

When Alexander Hamilton, one of the founding fathers, became the first Secretary of the Treasury, he was confronted with the question whether the United States had to pay the fiscal obligations of the Continental Congress. It would have been hard for the taxpayers of the new United States' government to pay the war debt of the previous government. It could have used its power as government to absolve itself of that debt, just as tyrannical governments and unstable governments had done before and have done since. However, that was not Hamilton's choice. He concluded that the United States should pay that debt. In so doing, he established a precedent which has guided American fiscal policy ever since: the government will not use its power as government to repudiate past fiscal

obligations. To do otherwise would be for the government to use its power as government (state action) to take away and abolish existing property rights.

The federal Constitution forbids the taking of property without due process of law. This applies to the states as well. Here, the Supreme Court of Florida recognized that the entitlement to the pension benefits to which the employees contributed, was a fiscal obligation of the City of Miami and their right to workers' compensation was one as well. However, the Supreme Court of Florida offered as the reason for absolving the City of that fiscal obligation that it would be hard for the taxpayers of today to pay that fiscal obligation.

As already mentioned, the City presented no evidence in this regard, that is, of any difficulty in paying Bell or any of the others. Therefore, they were not offered

procedural due process of law--fair notice and hearing--of any determination that the Supreme Court of Florida on its own would conclude that the City of Miami need not pay for yesterday's fiscal obligations because it would be hard for the taxpayers of the City to do so.

Neither can there be any balancing of constitutional rights in the present case as between the taxpayers of the City and the petitioners who are acknowledged by the City to be permanently totally disabled. There can be no balancing.[4]

In summary, the Supreme Court of Florida without any evidence in the record or in existence found that the Petitioner, Bell, and the other ten petitioners should

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[4] Congress made findings in the Americans with Disabilities Act, §12101, that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment,..." and that "individuals with disabilities continually encounter... relegation to lesser services, programs, activities, benefits, jobs or other opportunities." (Emphasis added).

have their vested property rights, their pensions, taken away because it would be unfair to the City's taxpayers to require them to pay for yesterday's fiscal obligations.

This is a taking of the Petitioner's property without due process of law of a kind that the federal Constitution was designed to prohibit.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Florida in this matter.

DATED: July 8, 1994

Respectfully submitted,

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